1460

(2)

No. 09-142

Supreme Court, U.S.
FILED
NOV 25 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

GEOFFREY N. FIEGER

Petitioner,

v.

MICHIGAN SUPREME COURT; CLIFFORD W. TAYLOR; MAURA D. CORRIGAN; ROBERT P. YOUNG, JR.; STEPHEN J. MARKMAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTHCIRCUIT

BRIEF IN OPPOSITION

Michael A. Cox
Attorney General

B. Eric Restuccia
Michigan Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Margaret A. Nelson
Heather S. Meingast
Assistant Attorneys General
Attorneys for Respondent

QUESTION PRESENTED

I. Does an attorney have a First Amendment right to publicly express non-defamatory personal criticism of a judge when that criticism could not affect any pending trial, as the Ninth Circuit and the supreme courts of Colorado, Oklahoma, and Tennessee have held, or is attorney subject to discipline for such criticism, as the Seventh Circuit and the supreme courts of Michigan, Mississippi, and Missouri have held?

PARTIES TO THE PROCEEDING

Petitioner, Geoffrey N. Fieger, is a licensed attorney in Michigan. Respondents are the Michigan Supreme Court, three current Justices on that court, Justice Maura D. Corrigan, Justice Robert P. Young, Jr., and Justice Stephen J. Markman, and one former Justice, Clifford Taylor.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED 1

INTRODUCTION 2

COUNTER-STATEMENT 3

REASONS FOR DENYING THE PETITION 8

I. The merits of Petitioner's constitutional challenges to M.R.P.C. 3.5(c) and 6.5(a) did not form the basis for the Sixth Circuit's decision and are not properly before the court 8

II. Petitioner has not raised the issue of standing in his question presented. And even if the issue were to be considered, the Sixth Circuit's decision was correct and consistent with Court precedent 9

A. This Court generally reviews only questions properly raised in the questions presented 9

CONCLUSION 23

TABLE OF AUTHORITIES

Page

Cases

Adair v. State of Michigan,
470 Mich. 105; 680 N.W.2d 386 (2004). 8

Ashcroft v. Mattis,
431 U.S. 171 (1977). 19, 20

Badalamenti v. William Beaumont Hosp.,
237 Mich. App. 278; 602 N.W.2d 854 (1999). 3

Board of Airport Comm'rs v. Jews for Jesus, Inc,
482 U.S. 569 (1987). 13

Brandywine, Inc. v. City of Richmond,
359 F.3d 830 (6th Cir. 2004). 12

Broadrick v. Oklahoma,
413 U.S. 601 (1973). 13

Brockett v. Spokane Arcades, Inc,
472 U.S. 491 (1985). 13

City of Los Angeles v. Lyons,
461 U.S. 95 (1983). 18

Fieger v. Grievance Administrator,
549 U.S. 1205 (2007). 5, 8

Grendell v. Ohio Supreme Court,
252 F.3d 828 (6th Cir. 2001),
cert. den., 534 U.S. 955 (2001). 14, 15, 16, 17

Grievance Administrator v. Fieger,
476 Mich. 231; 719 N.W.2d 123 (2007),
cert. den., 549 U.S. 1198 (2007). 3, 5, 6

Kowalski v. Tesmer,
543 U.S. 125 (2004). 10, 12

Laird v. Tatum,
408 U.S. 1 (1972). 14

Leonardson v. City of East Lansing,
896 F.2d 190 (6th Cir. 1990). 12

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992). 11, 12

MedImmune, Inc. v. Genentech, Inc. et al.,
549 U.S. 118 (2007) 11, 13, 21

Middlesex County Ethics Committee v. Garden State Bar Ass'n,
457 U.S. 423 (1982). 5

Morrison v. Board of Education,
521 F.3d 602 (6th Cir. 2008). 14

NAACP v. Button,
371 U.S. 415 (1963). 12

Peterson Novelties v. City of Berkley,
305 F.3d 386 (6th Cir. 2002). 8

Prime Media, Inc. v. City of Brentwood,
474 F.3d 332 (6th Cir. 2007). 12, 13

Ramirez v. Ramos,
438 F.3d 92 (1st Cir. 2006)..... 16

Sec'y of State of Maryland v. Joseph H. Munson Co., Inc.,
467 U.S. 947 (1984) 12, 13

Steffel v. Thompson, et al.
41 U.S. 452 (1974). 11, 13, 17, 21

Stone v. Powell,
428 U.S. 465 (1976). 10

Taxpayers for Vincent,
466 U.S. 789 (1984). 13

Triplett Grille Inc v. City of Akron,
40 F.3d 129 (6th Cir. 1994). 12

Virginia v American Booksellers Ass'n,
484 U.S. 383 (1988). 12, 13

Warth v. Seldin,
422 U.S. 490 (1975). 12

Winsness v. Yocom,
433 F.3d 727 (10th Cir. 2006). 16

Yee v. City of Escondido,
503 U.S. 519 (1992). 9, 10

Younger v. Harris,
401 U.S. 37 (1971). 5, 17

Rules

M.R.P.C. 3.5(c) ..... passim

M.R.P.C. 6.5(a) ..... passim

Mich. Ct. Rule 9.108 3

Mich. Ct. Rule 9.115 5

Mich. Ct. Rule 9.118 5

Sup. Ct. Rule 14.1(a) 9

OPINIONS BELOW

The January 20, 2009, panel decision of the U.S. Court of Appeals for the Sixth Circuit was recommended for full-text publication and is printed at Pet. App. 1. The petition for rehearing en banc was denied without opinion in an unpublished order dated May 1, 2009. Pet. App. 109.

JURISDICTION

Respondents concur in Petitioner's statement.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Respondents concur in Petitioner's statement.

INTRODUCTION

In this case, Petitioner Geoffrey N. Fieger, a Michigan attorney, asks this Court to review whether Michigan Rules of Professional Conduct, which prohibit discourteous conduct by attorneys, are facially unconstitutional under the First and Fourteenth Amendments. That question, however, was not decided by the U.S. Court of Appeals for the Sixth Circuit because that Court correctly determined that Petitioner did not have standing to bring these claims in federal court. The Sixth Circuit concluded that Petitioner had not sufficiently alleged an injury-in-fact, a required element of Article III standing, to support his claim.

This Court should deny the petition first because Petitioner is only seeking review of a question – the facial challenge to the courtesy rules – that was not decided by the Sixth Circuit. Without a majority decision on the constitutional question, there is no merits decision for this Court to review, and importantly, there was no decision on Respondents' alternative arguments that would also have precluded a decision on the merits in this case.

Second, because Petitioner does not seek review of the Sixth Circuit's substantive decision on standing, but only the unanswered constitutional question, this case does not present a proper vehicle for deciding either question. And, in any event, the Sixth Circuit's determination that Petitioner lacked standing was consistent with its own precedent and that of this Court. This Court therefore should decline review in this matter.

COUNTER-STATEMENT

This case involves a facial constitutional challenge under the First and Fourteenth Amendments to Michigan Rules of Professional Conduct (M.R.P.C.) 3.5(c) and 6.5(a) by attorney Geoffrey N. Fieger, who was disciplined on a single occasion under these rules.

The discipline upon which this case is based arises from an attorney grievance filed against Petitioner Fieger by the Michigan Attorney Grievance Administrator.[1] The grievance complaint alleged that Petitioner Fieger violated M.R.P.C. 3.5(c) and 6.5(a), as well as other rules, when he verbally attacked a panel of the Michigan Court of Appeals after the panel vacated a favorable jury award.[2] Over a two-day period during a local radio show hosted by Petitioner, Petitioner Fieger made vulgar and intemperate comments about the three judges involved in that decision. Petitioner Fieger addressed these judges by name and stated he "declared war on them"; suggested the judges should "[k]iss my ass" and that his client should "shove [his finger] up their asses"; called the judges "three jackass Court of Appeals judges"; suggested they be sodomized with a "plunger about the size of, you know my fist"; and referred to them as Adolf Hitler, Joseph Goebbels, and Eva Braun.[3]

---

[1] The Grievance Administrator is the investigative and prosecutorial arm of the Michigan Supreme Court in attorney discipline matters. Mich. Ct. Rule 9.108.

[2] *Badalamenti v. William Beaumont Hosp.*, 237 Mich. App. 278; 602 N.W.2d 854 (1999).

[3] *Grievance Administrator v. Fieger*, 476 Mich. 231; 719 N.W.2d 123, 129-130 (2007), *cert. den.*, 549 U.S. 1198 (2007).

Discipline proceedings were commenced against Petitioner Fieger with the filing of a grievance complaint alleging violations of M.R.P.C. 3.5(c) and 6.5(a).

M.R.P.C. 3.5(c) provides:

A lawyer shall not:

* * *

(c) engage in undignified or discourteous conduct toward the tribunal.

M.R.P.C. 6.5(a) states:

(a) A lawyer shall treat with courtesy and respect all persons involved in the legal process. A lawyer shall take particular care to avoid treating such a person discourteously or disrespectfully because of the person's race, gender, or other protected personal characteristic. To the extent possible, a lawyer shall require subordinate lawyers and nonlawyer assistants to provide such courteous and respectful treatment.

Petitioner and the Grievance Administrator subsequently stipulated to an agreement whereby Petitioner agreed not to contest that his remarks violated M.R.P.C. 3.5(c) and 6.5(a); to the imposition of a reprimand; and that Petitioner would be allowed to argue on appeal both the applicability and the constitutionality of the challenged rules.

On appeal to the Attorney Discipline Board,[4] the Board held in Petitioner's favor, and the Grievance Administrator then appealed to the Michigan Supreme Court, which granted leave. The Michigan Supreme Court issued its opinion on July 31, 2006.

A majority of the Michigan Supreme Court concluded that M.R.P.C. 3.5(c) and 6.5(a) applied to Petitioner's conduct, that his speech was not protected, and that the challenged rules were constitutional.[5] Petitioner Fieger then filed a petition for writ of certiorari seeking direct review of the Michigan Supreme Court's decision, which was subsequently denied.[6]

On April 7, 2006, while the discipline matter was still before the Michigan Supreme Court, Petitioner filed the complaint in this case. The Michigan Supreme Court and all seven Justices, in their respective official capacities, were named as defendants. The district court originally dismissed the complaint on abstention grounds under *Younger v. Harris*[7] and *Middlesex County Ethics Committee v. Garden State Bar Ass'n.* since the discipline proceedings remained pending.[8]

As noted above, three months later the Michigan Supreme Court released its decision in *Grievance*

---

[4] The Board is the adjudicative arm of the attorney discipline process and hears all appeals of right from discipline orders entered by the various hearing panels. Mich. Ct. Rule 9.115; Mich. Ct. Rule 9.118.

[5] *Grievance Administrator v. Fieger*, 719 N.W.2d at 123.

[6] *Fieger v. Grievance Administrator*, 549 U.S. 1205 (2007).

[7] *Younger v. Harris*, 401 U.S. 37 (1971).

[8] *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423 (1982).

Administrator v. Fieger, finding that M.R.P.C. 3.5(c) and 6.5(a) applied to Petitioner's speech and were constitutional, rejecting the First Amendment overbreadth and vagueness challenges Petitioner asserted.[9]

Petitioner then filed a motion for reconsideration and relief from judgment with the district court on August 11, 2006. After briefing and oral argument, the district court granted the motion on March 20, 2007, essentially concluding that the court had made a mistake in previously dismissing the case on abstention grounds. The court asked for supplemental briefing on the merits of Petitioner's constitutional claim.

Because the Justices were each named separately, it was necessary to separate their defenses given the nature of the case and the fact the district court was proceeding to the merits of the case. Three Justices, Marilyn Kelly, Michael Cavanagh, and Elizabeth Weaver, had dissented from the majority in the *Grievance Administrator* decision.

The parties then briefed the merits and other issues, including standing, Eleventh Amendment immunity, and the preclusion doctrine. On September 4, 2007, the district court granted summary judgment in favor of Petitioner, concluding that the courtesy rules were unconstitutional under the First Amendment. The court entered its judgment against the Michigan Supreme Court and the four Justices who comprised the majority in *Grievance Administrator v. Fieger*. These Respondents appealed to the U. S. Court of Appeals for the Sixth Circuit.

---

[9] *Grievance Administrator v. Fieger*, 719 N.W.2d at 123.

In its opinion on appeal from the district court's judgment in this case, the Sixth Circuit Court of Appeals concluded, in a 2-1 decision, that Petitioner Fieger lacked standing to raise the facial constitutional challenges asserted in this federal action. The majority opinion did not address the other jurisdictional issues raised by Respondents, including the Eleventh Amendment jurisdictional bar of the claims against the Michigan Supreme Court, or preclusion doctrine. Most notably, the majority did not address the merits of the First and Fourteenth Amendment claims.

Rather, the majority concluded Petitioner Fieger lacked standing because he "failed to demonstrate actual present harm based on a single, stipulated reprimand." Pet. App. 3. He did not articulate, with any degree of specificity, his "intended speech and conduct" that was being chilled; and did not sufficiently establish "a threat of future sanction under the narrow construction of the challenged provisions applied by the Michigan Supreme Court." Pet. App. 3. The majority vacated the judgment of the district court and remanded the case with instructions to dismiss the complaint for lack of jurisdiction. Pet. App. 3.

REASONS FOR DENYING THE PETITION

I. The merits of Petitioner's constitutional challenges to M.R.P.C. 3.5(c) and 6.5(a) did not form the basis for the Sixth Circuit's decision and are not properly before the court.

Contrary to Petitioner's argument, the constitutional issues argued below and in his Petition did not form the basis for the Sixth Circuit's decision. The majority for the Sixth Circuit decided this case on the standing issue. Yet, Petitioner's argument principally focuses on the substantive issues raised in his complaint and decided by the district court. Further, Petitioner's arguments are an ill-disguised attempt to obtain another direct review of the Michigan Supreme Court's decision in *Grievance Administrator v. Fieger*, a review that was previously rejected by this Court.[10]

Petitioner also ignores the substantial jurisdictional issues raised by this argument including the application of the preclusion doctrine — both claims and issue preclusion. These constitutional challenges either were or could have been raised in *Grievance Administrator v. Fieger* before the Michigan Supreme Court, the test under Michigan's law for determining the preclusive effect of this judgment.[11]

Because neither the merits of the constitutional claims nor these substantial jurisdictional issues were decided by the Sixth Circuit, there is no decision for this Court to review on these legal questions. A grant of certiorari to review the substantive constitutional

---

[10] *Fieger v. Grievance Administrator*, 549 U.S. 1205.

[11] *Peterson Novelties v. City of Berkley*, 305 F.3d 386, 394 (6th Cir. 2002); *Adair v. State of Michigan*, 470 Mich. 105, 121; 680 N.W.2d 386 (2004).

challenges asserted by Petitioner should therefore be denied.

II. Petitioner has not raised the issue of standing in his question presented. And even if the issue were to be considered, the Sixth Circuit's decision was correct and consistent with Court precedent.

A brief review of the question presented in the petition for certiorari reveals that Petitioner seeks review of whether Michigan's courtesy rules for attorneys violate the First Amendment of the U.S. Constitution, a question the Sixth Circuit did not decide on the merits, or even as an alternative basis for denying relief. To the extent the issue of standing – the only issue decided on the merits by the Sixth Circuit – may be considered properly before the Court, the Sixth Circuit's decision is consistent with this Court's precedent. Therefore the Court should decline review in this case.

A. This Court generally reviews only questions properly raised in the questions presented.

This Court has held that only a question raised by a petitioner in the questions presented is properly before the Court. For example, in *Yee v. City of Escondido*, this Court observed that the framing of the question presented has significant consequences because under Supreme Court Rule 14.1(a), "'only the questions set forth in the petition, or fairly included therein, will be considered by the Court.'"[12] "While 'the statement of any question presented will be deemed to comprise every subsidiary question fairly included therein,' . . . we

---

[12] *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) (quoting Sup. Ct. Rule 14.1(a)).

ordinarily do not consider questions outside those presented in the petition for certiorari."[13] This Court noted that this rule was "prudential in nature," and that the Court will only disregard it "'in the most exceptional cases,'" where reasons of urgency or of economy suggest the need to address the unpresented question in the case under consideration."[14]

Here, Petitioner's statement of the question is directed only at his First and Fourteenth Amendment facial challenge to the constitutionality of Michigan's courtesy rules. He does not seek review of the Sixth Circuit's substantive decision concluding that he lacked standing to pursue his constitutional claims. Furthermore, the question of standing is not fairly included within the First Amendment question. As the Court in *Yee* observed, to be "fairly included" the question must be more closely aligned with the question presented than merely being "related" or "complementary."[15]

The question of standing is a significant question of law in its own right, and while possibly related, the answer to that question is, in no way, driven by the substantive answer of whether the courtesy rules are constitutional.[16] Because Petitioner does not seek review of the Sixth Circuit's decision on standing, but only the constitutionality of the courtesy rules, this case does not present this Court with a proper vehicle for resolving either legal question.

---

[13] *Yee v. City of Escondido*, 503 U.S. at 535 (citations omitted).

[14] *Yee v. City of Escondido*, 503 U.S. at 535 (quoting *Stone v. Powell*, 428 U.S. 465, 481, n. 15 (1976)).

[15] *Yee v. City of Escondido*, 503 U.S. at 537.

[16] See, e.g., *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004).

B. The Sixth Circuit's decision that Petitioner lacked standing was correct and consistent with Court precedent.

Petitioner's argument with respect to standing relies on the dissent to support the proposition that the Sixth Circuit's decision represents a fundamental misunderstanding of this Court's jurisprudence on standing. The opposite, however, is true here.

Relying principally on this Court's decisions in *MedImmune Inc. v. Gentech, Inc.,* and *Steffel v. Thompson,* the dissent suggested and Petitioner argues that because this is a declaratory judgment action, all that needs to be shown to establish standing is "whether the facts alleged, under the circumstances, show that there is a substantial controversy" between the parties. Pet. App. 53.[17] Not only is Petitioner's reliance on these cases misplaced because they did not address Article III standing, Petitioner's analysis overgeneralizes the law of standing, even in the context of a First Amendment overbreadth action.

Standing is "assessed under the facts existing when the complaint is filed."[18] As noted by the Sixth Circuit, under the traditional requirements for standing, a plaintiff must establish: (1) injury in fact, meaning an invasion of a legally-protected interest that is concrete, particularized, and actual or imminent; (2) a causal relationship between the injury and the challenged conduct; and (3) a likelihood that the injury will be

---

[17] *MedImmune, Inc. v. Genentech, Inc. et al.*, 549 U.S. 118 (2007); *Steffel v. Thompson, et al.* 41 U.S. 452 (1974).

[18] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570 n.4 (1992).

redressed by a favorable decision.[19] To bring a cause of action in federal court, there must be some threatened or actual injury resulting from the putatively illegal action.[20] These are the required showings a plaintiff must make to meet the requirements of constitutional standing under Article III.[21]

This Court has recognized a second strand of the standing inquiry involves the doctrine of prudential standing; a judicially-created doctrine relied on as a tool of "judicial self-governance."[22] Prudential standing requirements preclude litigation in federal court "when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens," or where instead of litigating "'his own legal rights and interests, 'the plaintiff instead purports to 'rest his claim to relief on the legal rights or interests of third parties.'"[23]

The First Amendment overbreadth doctrine is a recognized exception to the consideration of prudential standing.[24] Thus, a plaintiff may challenge laws that by

---

[19] *Brandywine, Inc. v. City of Richmond*, 359 F.3d 830, 834-35 (6th Cir. 2004).

[20] *Virginia v American Booksellers Ass'n*, 484 U.S. 383, 392-93 (1988).

[21] *Lujan*, 504 U.S. at 560.

[22] *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

[23] *Prime Media, Inc. v. City of Brentwood*, 474 F.3d 332, 337-38 (6th Cir. 2007) (quoting *Warth v. Seldin*, 422 U.S. at 500); *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004).

[24] *Sec'y of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 956-58 (1984); *Brandywine*, 359 F.3d at 835; *Leonardson v. City of East Lansing*, 896 F.2d 190, 195 (6th Cir. 1990) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). *See also Triplett Grille Inc v. City of Akron*, 40 F.3d 129, 135 (6th Cir. 1994); *Board of Airport*

virtue of their overbreadth inhibit the First Amendment rights of individuals who are not before the court, "even by a [plaintiff] whose own conduct may be unprotected."[25]

The overbreadth doctrine, however, does not excuse a First Amendment plaintiff from first establishing the requisite constitutional standing required by Article III.[26] Indeed, as explained by this Court in *Virginia v. Am. Booksellers Ass'n.*, "[t]o bring a cause of action in federal court requires that plaintiffs establish at an irreducible minimum an injury in fact; that is, there must be some threatened or actual injury resulting from putatively illegal action."[27] Thus, contrary to Petitioner's assertions, this Court's decisions in *MedImmune, Inc.* and *Steffel* do not excuse plaintiffs from establishing the "injury-in-fact" requirement necessary to show standing under Article III. Pet. App. 33-37. *MedImmune* and *Steffel* addressed whether the declaratory judgment action in those cases satisfied the case-or-controversy requirement of Article III. In both cases, this Court recognized the need for a plaintiff to demonstrate a genuine threat of enforcement, a requisite factor ignored by Petitioner in this case.

The Sixth Circuit's well-reasoned analysis, though, addressed the standing issue in both the factual and legal context presented here. The Court recognized

---

Comm'rs v. Jews for Jesus, Inc, 482 U.S. 569, 574 (1987) (quoting *Brockett v. Spokane Arcades, Inc*, 472 U.S. 491 (1985)).

[25] *Taxpayers for Vincent*, 466 U.S. 789, 798-99 (1984); *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

[26] *Broadrick*, 413 U.S. at 612.

[27] *Virginia v. Am. Booksellers Ass'n.*, 484 U.S. at 392-93. *See also Sec'y of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. at 958; *Prime Media, Inc.*, 474 F.3d at 337-38.

that even the "relaxed approach" to standing in the First Amendment overbreadth context does not "eviscerate the standing requirement which is a constitutional mandate that is 'absolute' and 'irrevocable.'" Pet. App. 13-14.

The Sixth Circuit applied these standing requirements in the context of Petitioner's argument in support of his facial challenges to M.R.P.C. 3.5(c) and 6.5(a). First, Petitioner argued he suffered actual present harm because the courtesy rules and the threat of discipline for violating them have "chilled" his speech and conduct. Second, Petitioner argued he suffers a significant possibility of future harm because he was twice subjected to disciplinary proceedings under the rules. Of course only once did this result in discipline, to which Petitioner himself consented.

The Sixth Circuit correctly rejected Petitioner's subjective assertion of "chilled" speech as conferring standing. This was consistent with this Court's precedent in *Laird v. Tatum*, where the Court determined that "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm."[28] It was also consistent with the Sixth Circuit's own precedent.[29]

The Court also properly rejected Petitioner's second argument of threatened harm of future injury as

---

[28] *Laird v. Tatum*, 408 U.S. 1, 13-14 (1972).

[29] *See Morrison v. Board of Education*, 521 F.3d 602, 608-10 (6th Cir. 2008) (holding that high school student did not have standing in First Amendment overbreadth case where student stifled his own speech based on subjective fear of punishment by school district) and *Grendell v. Ohio Supreme Court*, 252 F.3d 828 (6th Cir. 2001), *cert. den.*, 534 U.S. 955 (2001).

having been "significantly diminished by the narrow construction placed on the courtesy and civility provisions by the Michigan Supreme Court and by the specific factual context in which Fieger was sanctioned." Pet. App. 20. The Sixth Circuit concluded that, in light of the narrowing construction, the Michigan Supreme Court acknowledged that lawyers have a right to criticize judges generally. However, given Fieger's extreme remarks about participants in a pending case – for which he stipulated to a reprimand – "it is incumbent upon [Petitioner] to articulate something more than a generalized, speculative 'chilling' of speech to establish the required injury-in-fact." Pet. App. 22. Petitioner has not demonstrated any error in this analysis or the certainty of future enforcement justifying a conclusion that the injury-in-fact requirement of standing was met in this case.

Indeed, in determining whether the facts alleged established Petitioner's standing to bring these constitutional challenges, the Sixth Circuit looked to its own precedent, and found that this case was controlled by the result in *Grendell v. Ohio Supreme Court*—an analogous case.[30]

There, the plaintiff attorney brought an action for declaratory and injunctive relief against the Ohio Supreme Court in an attempt to forestall the imposition of sanctions against him for his filing of a frivolous lawsuit against several Ohio legislators. The attorney alleged the rule was facially unconstitutional under the Fifth and Fourteenth Amendments to the Constitution. The Sixth Circuit concluded that the attorney did not have standing to sue because he had not alleged a sufficient injury in fact, either based on his past

---

[30] *Grendell v. Ohio Supreme Court*, 252 F.3d 828.

exposure to sanctions by the Ohio Supreme Court, or his assertion that the Ohio rule of practice "chilled" his exercise of protected conduct. With respect to the latter, the attorney argued that the Ohio Supreme Court's power to sanction attorneys pursuant to the rule, "'continuously expose[s the plaintiff-appellant] . . . to the "chilling effect" of the hanging of the "Sword of Damocles" over them.'"[31]

As evidence of the chilling effect, the attorney alleged that fear of unconstitutionally imposed sanctions forced him to withdraw from two cases before the Ohio Supreme Court. The Sixth Circuit determined that the attorney could not rely on this argument because no First Amendment activity was "impugned":

> Even assuming arguendo that attorney sanctions for frivolous or harassing lawsuits implicate First Amendment concerns, [plaintiff] cannot establish that his fear of unconstitutionally imposed sanctions is a chilling effect sufficient to confer standing. [32]

The Sixth Circuit in *Grendell* observed that in assessing the chilling effect criminal statutes have on First

---

[31] *Grendell*, 252 F.3d at 834 (internal citation omitted).

[32] *Grendell*, 252 F.3d at 834-35 (internal citations omitted). *See also Ramirez v. Ramos*, 438 F.3d 92, 98 (1st Cir. 2006) ("'[P]arty's subjective fear that she may be prosecuted for engaging in expressive activity will not be held to constitute an injury for standing purposes unless that fear is objectively reasonable.'"); *Winsness v. Yocom*, 433 F.3d 727, 734 (10th Cir. 2006) (Overbreadth "does not exempt plaintiffs - even plaintiffs bringing facial challenges on overbreadth grounds - from the bedrock Article III standing requirements of injury-in-fact, causation, and redressability.").

Amendment expression, this Court has previously noted that "it is not necessary that [a plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights."[33] However, those fears of prosecution cannot be merely "imaginary or speculative."[34] The *Grendell* Court stated that the "mere fact that [plaintiff] subjectively fears such sanctions, or 'feels inhibited' by the Ohio Supreme Court's sanctioning power, does not objectively establish an imminent threat that chills protected activity."[35]

The Court acknowledged that the previous imposition of sanctions was a factor the Court could consider in its standing determination, but that the plaintiff presented no evidence that the Ohio Supreme Court threatened to sanction him in the cases from which he withdrew, or that the Ohio Supreme Court was currently threatening the plaintiff with sanctions in any other case. Thus, the Sixth Circuit concluded "any alleged chilling effect that [the Ohio Supreme Court Rule] ha[d] on protected activity [was] an insufficient injury to support standing."[36]

Here, the Sixth Circuit properly applied the same analysis – in keeping with this Court's precedent – to Petitioner. The Sixth Circuit acknowledged that *Grendell* was a Fifth Amendment case, but found it persuasive because of the nearly identical facts, and that both attorneys alleged "chill" as the purported injury. Pet. App. 27. The Court determined that under

---

[33] *Grendell*, 252 F.3d at 834 (quoting *Steffel*, 415 U.S. at 459).

[34] *Grendell*, 252 F.3d at 834 (quoting *Younger*, 401 U.S. at 42).

[35] *Grendell*, 252 F.3d at 835 (citation omitted).

[36] *Grendell*, 252 F.3d at 835.

Grendell, to show a palpable threat of future injury necessary to achieve standing, Petitioner had to demonstrate a chain of speculative events:

> (1) that [Petitioner is] now, or highly likely to be, speaking about a pending case; (2) that such speech will concern participants in that case and be vulgar, crude, or personally abusive, exposing them to sanctions under MRPC 3.5(c) or MRPC 6.5(a); (3) that the Michigan Supreme Court would, in its discretion, impose such sanctions; and (4) that the imposition of those sanctions would violate [Petitioner's] First Amendment rights. As in *Grendell*, we conclude that such a chain of events is simply too attenuated to establish the injury in fact required to confer standing. [Pet. App. 27.]

The Sixth Circuit noted the *Grendell* Court's reliance on this Court's decision in *City of Los Angeles v. Lyons.*[37] There, this Court held that the plaintiff did not have standing to challenge the City police department's use of chokeholds, even though he had been the prior victim of such action, because the plaintiff's fear that he would, sometime in the future, again be subjected to the unlawful use of such a chokehold, was insufficient to show future injury.[38]

The Sixth Circuit observed that Petitioner's justification for standing was even less "robust" than the plaintiff in *Lyons*, who had been injured by the use of the

---

[37] *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

[38] *City of Los Angeles v. Lyons*, 461 U.S. at 105.

chokehold, and who alleged that it was a policy of the City police department to routinely engage in the use of the challenged chokeholds. Pet. App. 29. This was because Petitioner Fieger did not allege that Respondents were "improperly wielding" the courtesy rules to regularly discipline attorneys for their speech, or even allege that any other attorney had been disciplined under these rules. Pet. App. 29-30. The Court further observed that Petitioner did not contend that any of the disciplinary authorities in Michigan were specifically targeting Petitioner:

> In fact, the district court noted that Fieger is "a vocal, often harsh, and at times vulgar critic of Michigan's judiciary." Despite his significant history of criticizing Michigan's judges, it is revealing that Fieger's record consists of a single, isolated reprimand under the challenged provisions. Based on that history, Fieger has failed to demonstrate a reasonable threat of future sanction. [Pet. App. 30.]

The Sixth Circuit also found persuasive the *Grendell* Court's reliance on this Court's decision in *Ashcroft v. Mattis*.[39]

In *Mattis*, this Court held that the plaintiff father did not have standing to challenge a state statute authorizing the use of deadly force during an arrest on the basis that the plaintiff, whose son had been killed while fleeing from arrest, had another son who might one day flee from arrest and would thus be in danger of being killed by the defendants.[40] This Court ruled that

---

[39] *Ashcroft v. Mattis*, 431 U.S. 171 (1977).

[40] *Mattis*, 431 U.S. at 171-172 and n.2.

such "speculation" was "insufficient to establish the existence of a present, live controversy."[41] The Court resisted the urge to resolve the merits of the case in the absence of a required case or controversy, and where the issue of liability regarding the son's death had already been decided, and observed that the plaintiff's primary claim of present interest in the case was that he would obtain emotional satisfaction from a ruling that his son's death was wrongful.[42] "Emotional involvement in a lawsuit is not enough to meet the case-or-controversy requirement . . . .[43]

Bearing *Mattis* in mind, the Sixth Circuit reviewed the context in which this case had arisen, and noted that while Petitioner sought a declaration that the courtesy rules were unconstitutional, he was essentially seeking review of the Michigan Supreme Court's prior determination, and this Court's refusal to hear the matter:

> We remind plaintiffs that the [Michigan Supreme] court's judgment is not the subject of this appeal because, consistent with *Mattis*, "[t]hat issue has been decided . . . ." *Id.* at 172. Nevertheless, Fieger, like the plaintiff in *Mattis*, attempts to accomplish through the back door what he could not through the front -- invalidation of the very rules that he admittedly violated. In this way, Fieger's primary objective resembles that of the plaintiff in *Mattis*: to re-litigate the disciplinary

---

[41] *Mattis*, 431 U.S. at 172 n.2.

[42] *Mattis*, 431 U.S. at 172-173.

[43] *Mattis*, 431 U.S. at 172-173.

> proceedings in Michigan, but this time in federal court. Fieger invites us to void the rules he violated based on sheer speculation of future discipline. We decline the invitation. [Pet. App. 32-33.]

The Court thereafter reviewed and rejected the various cases Petitioner and the dissent cited to support their position that Petitioner had or would suffer an injury-in-fact, including *Steffel* and *Genentech*. Pet. App. 33-43.

Thus, the Sixth Circuit concluded that Petitioner lacked standing to sue under Article III because he could not sufficiently allege an injury-in-fact based on an "actual present harm or a significant possibility of future harm based on a single, stipulated reprimand." Pet. App. 45-46. The Court further concluded that Petitioner had not "articulated with any degree of specificity" his intended speech and conduct and had not "sufficiently established a threat of future sanction under the narrow construction" of the courtesy rules provided by the Michigan Supreme Court. Pet. App. 46. The Sixth Circuit accordingly reversed the district court.

This case would be different if Petitioner had more concretely identified the circumstances of the future speech he believes he will or he intends to engage in regarding Michigan judges, other than to simply suggest to the courts he might say something unpleasant about judges in the future. The same would be true if Petitioner's fear of prosecution under the courtesy rules was more convincing. The facts, however, did not support Petitioner's speculative fear. As the Sixth Circuit observed the rules are rarely enforced, and only once was Petitioner disciplined, and even then it was upon his consent.

Moreover, Petitioner's argument fails to identify any conflict between the circuit courts of appeals regarding the law of standing as applied in this particular case. More importantly, Petitioner's argument further fails to identify any substantial conflict between the Sixth Circuit's decision here and this Court's precedent regarding Article III standing. Finally, Petitioner fails to present any substantial issue of law for consideration in this case necessary for this Court's review.

CONCLUSION

For these reasons, Respondents ask this Court to deny the petition for writ of certiorari.

Respectfully submitted,

Michael A. Cox
Attorney General

B. Eric Restuccia
Michigan Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Margaret Nelson
Heather Meingast
Assistant Attorneys General
Attorneys for Respondent

Dated: November 2009